

MULTI-JURISDICTIONAL RECEIVABLES FINANCING: UNCITRAL'S IMPACT ON SECURITIZATION AND CROSS-BORDER PERFECTION

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I. INTRODUCTION

The United Nations Convention on the Assignment of Receivables in International Trade (the Convention) was finalized by the United Nations General Assembly and opened for signature by states in December 2001.¹ Based on a text prepared by the United Nations Commission on International Trade Law (UNCITRAL),² the Convention will enter into force upon being adopted by five states.³ Its main goal is to facilitate the financing of contractual monetary claims

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1. United Nations Convention on the Assignment of Receivables in International Trade, *opened for signature* Dec. 12, 2001, G.A. Res. 56/81, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/81 (2002), *available at* <http://www.uncitral.org/stable/res5681-e.pdf> (last visited Mar. 5, 2002); United Nations Convention on the Assignment of Receivables in International Trade, *available at* <http://www.uncitral.org/english/texts/payments/ctc-assignment-convention-e.pdf> (last visited Mar. 5, 2002) [hereinafter United Nations Convention on the Assignment of Receivables in International Trade; or the Convention].

2. UNCITRAL adopted the text at its thirty-fourth session in June/July 2001. Draft Convention on the Assignment of Receivables in International Trade, UNCITRAL, 34th Sess., UNCITRAL 32 Y.B., U.N. Doc. A/56/17, Annex I (2001), *available at* <http://www.uncitral.org/en-index.htm> (last visited Mar. 4, 2002). For a list of the preparatory documents, see footnotes 1 through 11 of the article-by-article commentary on the Draft Convention before the Commission in June/July 2001. Analytical Commentary on the Draft Convention on Assignment of Receivables in International Trade, UNCITRAL, 34th Sess., U.N. Doc. A/CN.9/489 (2001), *available at* <http://www.uncitral.org/en-index.htm> (last visited Mar. 20, 2002). UNCITRAL is the core legal body in the United Nations system in the field of international trade law unification and harmonization.

3. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 45(1).

(receivables),⁴ including securitization⁵ and related service transactions in which no financing is provided. The preamble of the Convention explicitly identifies facilitating credit at more affordable rates and protecting debtors as goals of the Convention. These goals may well be read as an indirect reference to practices such as securitization.⁶

The Convention could have “a dramatic impact on removing significant legal barriers to growth in the financing of international trade”⁷ This article discusses briefly the ways in which the Convention may facilitate that result.⁸ Part II examines the basic terminology and the scope of application of the Convention. Part III discusses the impact of key provisions of the Convention relating to the effectiveness of an assignment and, in particular, to future receivables and receivables that are not individually identified. Part IV addresses the impact of the main provisions dealing with the relationship between the assignor and the assignee. Part V deals with the assignee-debtor relationship, and Part VI with the perfection of assignments.

4. *Id.* art. 2.

5. See generally Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133 (1994) (demonstrating the asset securitization process and its unique benefits); Symposium, *International Issues in Cross-Border Securitization and Structured Finance*, 8 DUKE J. COMP. & INT'L L. 229 (1998); INTERNATIONAL ASSET SECURITIZATION 3 (Joseph J. Norton & Paul R. Spellman eds., 1995).

6. For a more detailed discussion of the general principles of the Convention and its effect on domestic law, see Spiros V. Bazinas, *Le Projet de Convention de la CNUDCI. Ses Objectifs et Ses Effets sur les Autres Lois* [The UNCITRAL Convention Project. Its Objectives and Its Effects on Other Laws], 75 REVUE DE DROIT BANCAIRE ET DE LA BOURSE 169, 171–182 (1999) [hereinafter Bazinas, *Le Projet*]; Spiros V. Bazinas, *Die Arbeit von UNCITRAL Im Bereich Der Forderungsabtretung Zur Kreditsicherung* [UNCITRAL's Work in the Area of the Assignment of Claims with Regard to Credit Securitization], in DIE FORDERUNGSABTRETUNG, INSBESONDERE ZUR KREDITSICHERUNG 99 (Walther Hadding & Uwe H. Schneider eds., 1999).

7. Harry C. Sigman & Edwin E. Smith, *The Draft UNCITRAL Convention on Assignment of Receivables in International Trade: A Summary of the Key Provisions as Completion Draws Near*, 33 UCC L.J. 344, 356 (2001). For the economic impact of secured transactions laws in general, see Heywood W. Fleisig & Nuria de la Pena, *Guatemala: How Problems in the Framework for Secured Transactions Limit Access to Credit*, Center for the Economic Analysis of Law (CEAL) (Nov. 1998) (on file with the Duke Journal of Comparative and International Law). CEAL's website is at <http://www.ceal.org> (last visited Apr. 19, 2002).

8. For a discussion of earlier drafts of the Convention, see Spiros V. Bazinas, *An International Legal Regime for Receivables Financing: UNCITRAL'S Contribution*, 8 DUKE J. COMP. & INT'L L. 315 (1998); see also CARSTEN BOEHM, *DIE SICHERUNGSABTRETUNG IM UNCITRAL-KOVENTIONSSENTWURF* [ASSIGNMENT FOR SECURITY PURPOSES IN THE UNCITRAL DRAFT CONVENTION], “DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING” (Shaker Verlag, Aachen 2000).

Part VII discusses the independent conflict-of-laws rules of the Convention.

II. SCOPE OF APPLICATION OF THE CONVENTION

A. Substantive Scope of Application

1. *Assignment, Assignor, Assignee, Debtor, Original Contract.* “Assignment” is defined in the Convention as a transfer of property in receivables.⁹ It includes the creation of security rights in receivables and the transfer of full property in receivables, whether for security purposes or not.¹⁰ “Assignor” is the old creditor in the transaction giving rise to the assigned receivable (original contract), who is normally (but not necessarily) the borrower in the financing contract. “Assignee” is the new creditor, the lender in the financing contract. “Debtor” is the obligor in the original contract.

2. *Receivable.* The Convention defines a “receivable” as a contractual monetary claim.¹¹ The Convention, however, excludes from its scope certain types of assignments or the assignment of certain categories of receivables. Some assignments are excluded because there is no market for them (e.g., assignments for consumer purposes).¹² The assignment of certain categories of receivables is excluded because they are already sufficiently regulated. Thus, additional regulation under the Convention either is not needed or could be detrimental to the relevant industry, as in the cases of assignments of “financial” receivables, such as those arising from securities, letters of credit, and bank deposits.¹³

9. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 2.

10. The issue of whether an assignment is an assignment by way of security or an outright transfer is left to the law of the assignor’s location. *See id.* arts. 5(g), 22.

11. *Id.*

12. By comparison, assignments of consumer receivables are within the scope of the Convention. *See id.* art. 4(1)(a).

13. *Id.* art. 4(2). Worthy of particular reference is the exclusion of transactions involving the assignment of receivables from securities or other financial assets or instruments held with an intermediary (see Article 4(1)(e)). This exclusion reflects verbatim the text suggested by the securities industry. Directly-held securities are not expressly referred to. To the extent they are negotiable instruments, a matter left to national law, they are covered by the hold-harmless clause of Article 4(3). This means, for example, that priority issues with respect to securities-related receivables will be subject to the law applicable under law outside the Convention. To the extent that securities-related receivables are not negotiable instruments, their assignment could be excluded under Article 4(2)(e) and Article 7(2) (which provides that a matter gov-

The assignment of other categories of receivables, namely rights of parties under negotiable instrument, consumer protection, or real estate law, is not excluded from the scope of the Convention, but the Convention cannot affect the rights of certain parties to the assignment of such receivables.¹⁴

Finally, the Convention allows states to exclude further practices by way of declaration. In an effort to establish the appropriate balance between flexibility and certainty with respect to its application, the Convention requires such a declaration to be specific and limits it mainly to non-trade receivables.¹⁵

3. *Internationality.* The Convention applies to assignments or receivables that are international at the time of the conclusion of the assignment contract. The international character of an assignment or a receivable is determined by the location of the assignor, the assignee, or the debtor.¹⁶

4. *Location.* “Location” is a key term for determining whether an assignment or a receivable is international and whether a party is located in a contracting state. It is also important for identifying the

erned by the Convention, but not expressly settled by it, is to be resolved by reference to the general principles underlying the Convention (in this case, Article 4(2)(e)) and, in the absence of such principles, by reference to the law applicable by virtue of the conflict-of-laws rules of the forum. The latter result would also be obtained if one assumes that the matter is not governed by the Convention at all.

14. *Id.* art. 4(3)–(5). In the case of an assignment of real estate receivables (e.g., rents), the Convention ensures that if there is a conflict between an assignee and the holder of a right in real estate the conflict will be referred to the law of the state in which the real estate is located. The words “to the extent” are used in Article 4(5) not to limit the effect of the article and interfere with local law, but rather to define the cases in which a conflict may arise (i.e., where the assignment of a receivable confers a right in real estate and where real estate law confers a right in a receivable assigned to an assignee under the Convention; see U.N. GAOR, *Report of the United Nations Commission on International Trade on its thirty-fourth session*, 25 June–13 July 2001, 56th Sess., Supp. No. 17, ¶¶ 137–140, U.N. Doc. A/56/17 (2001), available at <http://www.uncitral.org/en-index.htm> (last visited Apr. 1, 2002). To the extent that there might be other conflict situations, they are not covered by Article 4(5) and are left to the law applicable outside the Convention. For a different view, see Harry C. Sigman & Edwin E. Smith, *Toward Facilitating Cross-Border Secured Financing and Securitization: An Analysis of the United Nations Convention on the Assignment of Receivables in International Trade*, in 57 THE BUSINESS LAW. 727, 734 (Feb. 2002).

15. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 41. Namely receivables other than those arising from the supply or lease of goods or services other than financial services, from construction contracts, from contracts for the sale or lease of real property, from credit card transactions, from the sale, lease or licensing of intellectual property or information, and from close-out payments under multi-party netting agreements.

16. *Id.* art. 3.

law applicable to priority. It is defined by reference to the place of business of a party, or the habitual residence, if there is no place of business.¹⁷ When an assignor or an assignee has places of business in more than one state, reference is to be made to the place of central administration (usually the principal place of business or the main center of interests), in other words, a single and easily determinable jurisdiction. This approach is intended to ensure certainty and predictability with respect to the application of the Convention (in particular with respect to the applicable priority rules). When a debtor has places of business in more than one state, reference is to be made to the place most closely connected to the original contract.¹⁸ A different approach was taken with respect to the location of the debtor to ensure that the debtor is not surprised by the application of a legal text, to which the original transaction between the debtor and the assignor had no relationship.

The central-administration location rule will refer transactions between a branch office of a foreign bank and another business in country A to the law of the place of central administration of the foreign bank in country B. To the extent that current national law refers to the law of the place to which a certain transaction is most closely connected, the central-administration location rule will introduce a change to national law. The certainty achieved through the central-administration location rule outweighs the potential discomfort from this change. In addition, this change will not affect transactions in which financing institutions are debtors of the original receivable as in such a case, reference is to be made to the close connection test. Moreover, this change will have a limited impact on transactions in which branch offices of financing institutions are assignors or assignees, since a number of banking transactions are excluded from the scope of application of the Convention (e.g., transactions relating to receivables from deposit accounts, letters of credit, securities, etc.).¹⁹

17. *Id.* art. 5(h).

18. *Id.*

19. *Id.* arts. 4(2), 9(3). At its 2001 session, UNCITRAL considered and rejected a suggestion to introduce an exception to the central-administration location rule with respect to branches of banks or other financial institutions. The suggestion was that branches of banks and other financial institutions should be deemed as being located in the state with the closest connection to the assignment. The reasons for the Commission's decision included that: exceptions would compromise the certainty achieved by the central-administration location rule, which was appropriate in the vast majority of cases; priority issues should be referred to the law of the state in which the bank or other financial institution would be wound up, namely their place of central administration; treating branches of banks or other financial institutions in effect as separate legal entities would create confusion in practice, in particular as to where to file; there was no

Further transactions may be excluded from the scope of Articles 9 and 10 by way of contractual limitation. The result of such exclusion is that the effectiveness of an anti-assignment clause is left to national law (the law governing the original contract under Article 29).

B. Territorial Scope of Application

The Convention will apply only if the assignor is located in a state that is a party to the Convention. The Convention imposes a different requirement for the application of the debtor-related provisions. These provisions will apply not only if the debtor too is located in a state that is a party to the Convention but also if the law governing the original contract from which the assigned receivables arise is the law of a state party to the Convention.²⁰

This approach reflects two assumptions. First, the debtor need not be located in a state party to the Convention for the provisions of the Convention dealing with the effectiveness of an assignment to apply because the debtor is protected through the Convention's notification requirements. Similarly, the debtor need not be located in a state party to the Convention for the application of the priority provisions of the Convention because the Convention draws a clear distinction between the debtor's protection and priority. Second, because the Convention (with the exception of the debtor-related provisions) governs if the assignor only is located in a state party to the Convention, the scope of application of the Convention is quite broad. Thus, the Convention's scope does not need to be extended or even complicated by reference to conflict-of-laws rules that are neither uniform nor fully effective.²¹

uniform understanding of the terms "bank" and "financing institution" and thus use of those terms might create uncertainty and have a different effect depending on the meaning given to those terms in the various countries. See U.N. GAOR, *Report of the United Nations Commission on International Trade*, *supra* note 14, ¶¶ 150–53. For further discussion, see generally Catherine Walsh, *Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade*, 106 DICK. L. REV. 159 (2001).

20. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, arts. 1(1)(a), 1(3).

21. For a detailed analysis of, *inter alia*, the Convention's applicability, see Franco Ferrari, *The Uncitral Draft Convention on Assignment in Receivables Financing: Critical Remarks on Some Specific Issues*, in PRIVATE LAW IN THE INTERNATIONAL ARENA-LIBER AMICORUM KURT SIEHR 179, 189 (Jurgen Basedow et al. eds., 2000).

III. EFFECTIVENESS OF THE ASSIGNMENT

The Convention does not contain a general substantive law rule with respect to the formal or material validity of the assignment.²² It does, however, contain conflict-of-laws rules providing the law applicable to those issues (formal and material validity as requirements for priority are left to the law governing priority, i.e. the law of the assignor's location).²³ In addition, the Convention contains substantive law rules with respect to several important issues related to the material validity of the assignment in order to address problems created in practice as a result of the way in which those issues are addressed in the various national laws. Such issues include statutory limitations, contractual limitations, and other form-related requirements.

A. Statutory Limitations

In many legal systems, the assignment of future receivables,²⁴ of parts or undivided interests in receivables, and of receivables that are not identified individually at the time of the assignment, is ineffective. At the heart of such statutory prohibitions of assignments are concerns relating to the impact of a bulk assignment of present and future receivables on the economic freedom of the assignor or related specificity concerns.²⁵ Concerns about the advantage gained by big financing institutions, obtaining a bulk assignment of all present and future receivables from their borrowers, over small suppliers, who are often protected by retention-of-title arrangements, are also cited to justify statutory prohibitions of bulk assignments.²⁶

22. At its 2001 session, UNCITRAL decided to replace a substantive law provision on formal validity with a conflict-of-laws provision and to reformulate Article 8 to validate certain important assignments. See U.N. GAOR, *Report of the United Nations Commission on International Trade*, *supra* note 14, ¶¶ 161–64.

23. See United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, arts. 5(g), 22; see also discussion of priority issues *infra* Part VI; and discussion of form in the context of the independent conflict-of-laws rules *infra* Part VII.B.

24. Under the Convention, a receivable is a “future receivable” if the contract from which it may arise does not exist at the time of the conclusion of the contract of assignment. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 5(b). Whether a receivable is mature, payable, or whether it has been earned by performance, is irrelevant.

25. See Hein Koetz, *Chapter 13: Rights of Third Parties. Third Party Beneficiaries and Assignment*, in 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ¶ 1, ¶¶ 58–91 (1992).

26. *Id.* ¶ 105.

The primary reasons for statutory prohibitions of partial assignments lie in the need to avoid debtor inconvenience, expense, and uncertainty as to how the debtor is to discharge the debt.²⁷

The Convention sets aside such statutory limitations on assignment; any limitation, not just an outright prohibition, is preempted. An assignment cannot be invalidated as against the assignor, the assignee, the debtor, or a third party on the sole ground that it is an assignment of a future receivable or a receivable that is not individually identified at the time of the assignment, or that it is an assignment of a part or an undivided interest in receivables. The only condition is that such receivables can be identified as receivables to which the assignment relates.²⁸

The Convention's approach can best be understood as embodying its objective of facilitating receivables financing, which benefits the entire economy. With more affordable credit, the assignor is likely to be able to increase the volume of its business. It is also likely to offer better terms to its buyers/debtors, who in turn may be able to buy more goods and services, a result which would be beneficial for all parties involved in international trade (as the Convention deals with assignments with an international element). To the extent statutory limitations are concerned with the priority given to big financing institutions, the Convention does not frustrate the objective of such limitations, because the Convention does not give priority to one assignee over the other. The Convention merely determines the law applicable to priority. Other statutory prohibitions, such as those relating to sovereign receivables, are not affected by the Convention.²⁹

B. Contractual Limitations

In many legal systems, an assignment made in violation of an anti-assignment clause in the original contract renders the assignment ineffective. The principle of freedom of contracts is used to justify such contractual limitations on assignment.³⁰

27. *Id.* ¶ 72.

28. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 8(1). However, if the debtor receives notification of a partial assignment, it may ignore it and pay the assignor. *Id.* art. 17(6). For an explanation of this approach, *see infra* Part V.B.

29. *Id.* arts. 8(3), 40. States may exclude by declaration the application of Articles 9 and 10 to assignments of sovereign receivables.

30. *See* Koetz, *supra* note 25, ¶ 73.

Under the Convention, an assignment is effective even if it is made in violation of an anti-assignment clause. In principle, liability that the assignor may have for breach of contract under law applicable outside the Convention is not set aside or reduced. However, the debtor may not avoid the original contract on the sole ground of the breach of the anti-assignment clause; mere knowledge of the anti-assignment agreement is not a sufficient ground for such liability.³¹ Furthermore, the Convention does not allow a claim for breach of an anti-assignment clause to be made by the debtor against the assignee by way of set-off so as to defeat the assignee's demand for payment.³²

The Convention sets aside contractual limitations on the basis of the assumption that, on balance, it is preferable to give precedence to the interest of the economy as a whole, even at the expense of some inconvenience to the debtor, rather than to protect debtors that have a way of protecting themselves. The Convention assumes that debtors can protect themselves if they are in a bargaining position, which is strong enough to negotiate anti-assignment clauses. There is one marked exception to the above. With respect to the assignment of sovereign receivables, states may enter a reservation with regard to the application of Articles 9 and 10 of the Convention. The reason for this exception is that not all states have a policy of invalidating the assignment of sovereign receivables by law, but may instead rely on contractual limitations. States that are debtors and have negotiated an anti-assignment clause may make use of such a reservation.³³

C. Form

As already mentioned, the Convention leaves form to the law applicable outside the Convention, which the Convention points to.³⁴ It is important to note here that form of the assignment as a requirement for priority is subject to the law governing priority (i.e., the law of the assignor's location).³⁵ However, to the extent that notification is a requirement for the effectiveness of an assignment as between the assignee and the assignor, it is set aside.³⁶

31. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 9(2).

32. *Id.* art. 18(2).

33. *Id.* art. 40.

34. See *infra* Part VII.B for discussion of the form of the contract of assignment in the context of the independent conflict-of-laws rules.

35. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, arts. 5(g), 22.

36. *Id.* art. 14(1); see also Sigman & Smith, *supra* note 14, at 738.

D. The Impact of the Convention on the Effectiveness of the Assignment

The impact of the Convention on the effectiveness of the assignment in an international context is significant, both for countries with and without a modern legal regime for receivables financing. For countries with a modern legal regime for receivables financing, the Convention introduces a secure way to validate the assignment of future receivables, bulk assignments (partial assignments, etc.), and assignments made despite an anti-assignment limitation. Applicable national law cannot provide such certainty in a cross-border context, no matter how modern, because if the applicable law runs counter to the public policy or mandatory law provisions of the forum (where a dispute is adjudicated or a foreign court decision is sought to be enforced), it could be set aside.³⁷

For countries without a modern legal regime for receivables financing, the Convention establishes the appropriate environment for business parties to be able to obtain credit on the basis of future receivables at more affordable rates, without unduly interfering with fundamental notions of national law.³⁸

IV. THE ASSIGNOR-ASSIGNEE RELATIONSHIP

A. Party Autonomy

The Convention recognizes the rights of the assignor and the assignee to structure their contract in any way they wish to meet their particular needs, so long as they do not affect the rights of third parties.³⁹ The Convention also gives legislative strength to trade usages agreed upon by the parties and trade practices established between such parties.⁴⁰

B. Default Rules

The Convention also includes certain default rules to provide a list of issues to be addressed in the contract and, at the same time, to

37. On the inherent limitations on the applicability of revised Article 9 U.C.C. to international transactions, see generally Neil B. Cohen & Edwin E. Smith, *International Secured Transactions and Revised Article 9 UCC*, 74 CHI.-KENT L. REV. 1191 (1999).

38. See Bazinas, *Le Projet*, *supra* note 6, at 174.

39. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, arts. 6, 11.

40. *Id.* art. 11. In an international assignment, only international usages are binding, unless otherwise agreed by the parties. *Id.*

fill any gaps left in the contract. Those default rules deal mainly with representations, notification, and payment.⁴¹

1. *Representations.* With respect to representations, the Convention attempts to establish a balance between fairness and practicality. For example, the risk of hidden defenses on the part of the debtor is placed on the assignor. This approach is taken in view of the fact that the assignor is the contractual partner of the debtor and is therefore in a better position to know whether there will be problems with the contract's performance which may give the debtor rights of defense. The risk of such defenses may be shifted, by agreement of the parties, to the assignee. However, such an approach would increase the cost of credit to the assignor.

2. *Notification.* As already mentioned above, the Convention provides that an assignment is effective as between the assignor and the assignee irrespective of whether the debtor had been notified, thus setting aside any national law notification requirements for the assignment to be effective as between the parties thereto. However, notification of the debtor triggers a change in which the debtor may discharge its obligation, freezes the debtor's rights of set-off to those available at the time of notification and makes any change to the original contract subject to the actual or constructive consent of the assignee.⁴²

Notification is defined as a writing that "reasonably identifies the assigned receivables and the assignee."⁴³ For a notification to be effective, it has to be received by the debtor (what constitutes receipt is left to the law applicable outside the Convention) and has to be "in a language that is reasonably expected to inform the debtor about its contents."⁴⁴

With respect to notification and payment, the main innovation in the Convention lies in the introduction of an independent right of the assignee to notify the debtor and demand payment as of the time of the assignment.⁴⁵ A right for the assignee to notify the debtor independently of the assignor is essential where the assignee's relationship with the assignor starts becoming problematic and the assignor is un-

41. *Id.* arts. 11–14.

42. *Id.* arts. 17, 18(2), 20(2).

43. *Id.* art. 5(d).

44. *Id.* art. 16(1).

45. *Id.* art. 13.

likely to cooperate with the assignee in notifying the debtor.⁴⁶ This right is recognized in current practice, according to which parties typically include in the assignment contract an authorization to the assignee to notify the debtor.

The Convention also provides that notification may be given (by the assignee or the assignor) even in violation of an agreement between them not to notify the debtor. The rationale underlying this approach lies in the need to protect the debtor from having to investigate agreements to which the debtor is not a party in order to find out how to obtain a valid discharge. However, such a notification in breach of an agreement between the assignor and the assignee has only a limited effect. The debtor is discharged if the debtor pays in accordance with such a notification, but the assignee does not obtain any (other) benefit from such a notification (e.g., the debtor is not precluded from accumulating rights of set-off even after such a notification).⁴⁷

3. *Contractual Right to Proceeds.* The Convention introduces a contractual right to proceeds of receivables. “Proceeds” are defined as “whatever is received in respect of an assigned receivable.”⁴⁸ It includes proceeds of proceeds, but not returned goods.⁴⁹ The Convention does not include any provisions as to tracing of proceeds. Therefore, the proceeds-related provisions of the Convention will apply only if proceeds are identifiable either by virtue of Article 24(2) (which provides for proceeds, for example, in a separate deposit or securities account; see below), or of the tracing-related provisions of the law applicable outside the Convention.

As between the assignor and the assignee, the assignee may claim proceeds (and returned goods) if payment is made to the assignee, to the assignor, or to another person over whom the assignee

46. In order to protect the debtor that receives a notification from the assignee, the Convention gives the debtor the right to request adequate proof, which the assignee has to provide within a reasonable time. *Id.* art. 17(7).

If the debtor requests and receives adequate information, the debtor obtains a valid discharge. What if the assignee is not the rightful claimant? The Convention deals with this matter as an issue of priority distinct from the debtor's discharge. The debtor is discharged if the debtor does all that is required under the Convention. Whether the assignee that received payment will retain the proceeds of such payment is subject to the priority provisions of the Convention and cannot affect the debtor's discharge. *Id.* art. 14(1)(c).

47. *Id.* art. 13(2).

48. *Id.* art. 5(j).

49. *Id.*

has priority. Whether the assignee may retain such proceeds is an issue of priority left to the law of the assignor's location.⁵⁰

V. THE ASSIGNEE-DEBTOR RELATIONSHIP

A. The Principle of Debtor Protection

Under the principle of debtor protection, an assignment does not affect the debtor's legal position without the debtor's consent, unless a provision of the Convention clearly states the opposite. Furthermore, the assignment cannot change the currency or the state in which payment is to be made.⁵¹

The Convention does not address whether the currency and place of payment may be changed by agreement between the assignor or the assignee and the debtor.⁵² However, the Convention is not intended to limit party autonomy under the law governing the original contract, if such autonomy exists in this regard under national law, or to introduce a right of the parties to change the country and the place of payment where such a right does not exist under national law.

Beyond generally codifying the principle of debtor protection, the Convention contains a number of specific expressions of this principle. These provisions deal mainly with the debtor's discharge, defenses, rights of set-off of the debtor, and waivers of such defenses or rights of set-off.

B. Discharge of the Debtor by Payment

Debtor discharge is based on an objective criterion, namely written notification in a language that is reasonably expected by the sender to be understood by the debtor and reasonably identifies the assigned receivables and the assignee.⁵³

Payment instructions are not a necessary element of the notification.⁵⁴ This means that a notification is effective even if it does not include a payment instruction (or includes a payment instruction that

50. *Id.* art. 14.

51. *Id.* art. 15.

52. However, as the payment instruction is not a necessary part of the notification, a notification containing an instruction for the debtor to pay in a country or in a currency other than that agreed in the original contract is not ineffective. In such a situation, in order to avoid the risk of having to pay twice, the debtor should request clarification or, in the case of a notification by the assignee, seek adequate proof of the assignment. *See id.* art. 17(7).

53. *Id.* arts. 17(1), 5(d), 16(1).

54. *Id.* art. 5(d).

runs counter to Article 15(2)) and is given only with a view to freezing the debtor's defenses and rights of set-off.

Whether the debtor knew or ought to have known of a previous assignment is irrelevant. The Convention adopts this approach so as to ensure an acceptable level of certainty as to debtor discharge. This approach does not encourage bad faith or fraud but attempts to ensure certainty with respect to payment by and discharge of the debtor, which is an important element in pricing a transaction. With respect to bad faith, it is always difficult to prove what the debtor knew or ought to have known. As to fraud, the Convention does not override national law provisions on fraud, nor does it upgrade fraud to the normal circumstance that needs to be addressed in a commercial law text.

The Convention also includes a series of rules dealing with multiple notifications or payment instructions relating to one and the same assignment, to several assignments of the same receivables by the same assignor, and to several subsequent assignments. When the debtor is given several payment instructions that relate to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.⁵⁵ In the case of several notifications relating to more than one assignment of the same receivables by the same assignor, the debtor is discharged by paying in accordance with the first notification received.⁵⁶ In the case of several notifications relating to subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.⁵⁷ In the case of several notifications relating to parts of or undivided interests in one or more receivables, the debtor is discharged by paying in accordance with the notifications or in accordance with the Convention as if no notification had been received.⁵⁸

By giving the debtor, in effect, the right to determine whether or not the notification of a partial assignment is effective with respect to debtor discharge,⁵⁹ the Convention avoids prescribing, in a regulatory

55. *Id.* art. 17(3).

56. *Id.* art. 17(4).

57. *Id.* art. 17(5).

58. *Id.* art. 17(6).

59. For example, a notification of a partial assignment is effective for the purpose of freezing the debtor's rights of set-off that are unrelated to the original contract and become available to the debtor after receipt of a notification.

manner, what the assignor, the assignee or the debtor ought to do. It also avoids creating liability for any damage or loss to the debtor. Such an approach does not invalidate partial assignments. It merely suggests that assignors and assignees may need to consider ensuring, at the time of the conclusion of the original contract or of the contract of assignment, the debtor's consent to notifications of partial assignments. If the debtor does not give its consent to such notifications, assignors and assignees need to structure payments in an appropriate way (for example, by agreeing on a lock-box arrangement).⁶⁰

One of the key debtor-protection provisions allows the debtor to request adequate proof of the assignment in cases in which notification is given by the assignee without the cooperation or apparent authorization of the assignor.⁶¹ This right is intended to safeguard the debtor from the risk of having to pay twice. Adequate proof includes a writing with the assignor's signature (e.g., the assignment contract or an authorization for the assignee to notify).⁶² If the assignee does not provide such proof within a reasonable period of time, the debtor may discharge by paying the assignor.⁶³

C. Debtor's Defenses and Rights of Set-Off

With respect to the debtor's defenses and rights of set-off, the Convention codifies generally accepted rules, under which the debtor may raise against the assignee any defenses or rights of set-off that the debtor could raise if the claim had been made against the assignor.⁶⁴ Rights of set-off arising from the original contract or a related transaction may be raised against the assignee even if they become available to the debtor after notification.

Rights of set-off that become available to the debtor after notification may not be raised against the assignee.⁶⁵ The meaning of the words "become available"—whether the right has to be quantified, has matured, or has become payable—is left to the law governing the

60. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 24(2).

61. *Id.* art. 17(7).

62. *Id.*

63. What if payment becomes due during the time the debtor expects to receive "adequate proof?" The purpose of the provision would require that for that short period, payment is suspended and no default interest accrues. A legitimate assignee could protect itself by promptly providing "adequate proof." *Id.* art. 17(7). Similarly, a responsible debtor could pay into an escrow account. *Id.* art 17(8).

64. *Id.* art. 18.

65. *Id.* art. 18(2).

original contract, if the right of set-off arises from the original contract.⁶⁶ The Convention contains no rule in this respect for other types of set-off.

The debtor may waive its defenses and rights of set-off by agreement with the assignor. A signed writing is required for such an agreement. Defenses or rights of set-off arising from fraudulent acts of the assignee, or which are based on the debtor's incapacity, may not be waived. The Convention does not deal with, and thus does not limit, any agreements between the debtor and the assignee by which the debtor may waive certain defenses in return for a benefit granted by the assignee (e.g., an extension of the payment period).⁶⁷

D. Impact of the Debtor-Related Provisions

The debtor-related provisions of the Convention address a number of issues with respect to which great uncertainty prevails in current national law. Most importantly, they provide an objective criterion for the debtor to obtain a valid discharge, avoiding undermining such a discharge on the basis of subsequent arguments about what the debtor knew or ought to have known about previous assignments. They also introduce certainty with respect to the defenses and rights of set-off of the debtor. This result can facilitate a steady flow of payments from the debtor and could thus have a positive impact on the availability and the cost of credit.

VI. THE RELATIONSHIP BETWEEN THE ASSIGNEE AND COMPETING CREDITORS

A. The Law Applicable to Priority

The main priority rules of the Convention are conflict-of-laws rules. A set of optional substantive law priority rules, for states to opt into by declaration, supplements these conflict-of-laws rules (see below).

The value of the Convention's conflict-of-laws rules lies in the fact that, departing from traditional approaches subjecting priority issues to the law chosen by the parties or the law governing the assigned receivables, they centralize all priority conflicts to the law of the assignor's location. Since "location" means the place of central administration, if the assignor has a place of business in more than

66. *Id.* art. 29.

67. *Id.* art. 19.

one state, priority conflicts are referred to the law of a single and easily determinable jurisdiction. In addition, this jurisdiction is going to be the place where the main insolvency proceeding with regard to the assignor will be opened, a result that makes conflicts between secured transactions and insolvency laws easier to address.⁶⁸

Compared with the uncertainty currently existing in the world with respect to the law applicable to priority, the value of the conflict-of-laws rules of the Convention is obvious.⁶⁹

There is also a great deal of cost-savings that may be achieved because of a few other characteristic provisions of the Convention.

1. *Priority.* One such provision relates to the definition of “priority.”⁷⁰ Priority is defined to include not only a right of preference but also the determination of whether the right is personal or *in rem*, whether or not it is a security right, as well as any steps necessary to render the right effective against a competing claimant.

The last element in that definition is a direct reference to form requirements as aspects of priority.⁷¹ However, it would seem that, with the exception of effectiveness-related issues settled elsewhere in the Convention, all other effectiveness issues would be governed by the law of the assignor’s location.⁷²

68. For a discussion of exceptions made to this location rule in U.C.C. Article 9 and the Canadian Personal Property Security Acts, see Walsh, *supra* note 19, at 183–84.

69. For example, it is not clear whether Article 12 of the Rome Convention covers issues of priority. European Communities Convention on the Law Applicable to Contractual Obligations, *opened for signature* 19 June 1980, 1980 O.J. (L 266) 1, *reprinted in* 19 I.L.M. 1492 (1980) [hereinafter Rome Convention]. Assuming that it does, it is not clear whether it refers them to the law agreed upon by the parties or to the law governing the assigned receivable. In any case, either solution is unworkable in the increasingly common case of bulk assignments of all present and future receivables. The law agreed to by the parties results in several laws in the case of several assignments; in any case, it is not appropriate to refer third-party effects to the law agreed by the parties to a contract. The law governing the assigned receivables contract has the same problem in the case of several receivables arising from various contracts. In addition, it does not allow parties to determine at the time of assignment the law applicable if future receivables are involved. For a critical evaluation of the present status of the law and an analysis of the merits of a place-of-assignor-based solution, see generally Eva-Maria Kieninger, *Das Statut der Forderungsabtretung im Verhältnis zu Dritten* [The Statute on the Assignment of Claims in Relation to Third Parties], 62 RABELS ZEITSCHRIFT 678 (1998); *see also* Teun H.D. Struycken, *The Proprietary Aspects of International Assignments of Debts and the Rome Convention Article 12*, 24 LLOYD’S MARIT. COM. L.Q. 345 (1998); Walsh, *supra* note 19, at 171.

70. *See* United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. (5)(g).

71. Formal validity as between the assignor and the assignee is, however, treated differently in Article 27. *See id.* art. 27.

72. *See* Walsh, *supra* note 19, at 203.

This would be the normal result in jurisdictions that do not distinguish between effectiveness as between the assignor and the assignee, and effectiveness as against third parties. In jurisdictions that make such a distinction, because an assignment that would be ineffective between the parties thereto could not be effective as against third parties, the (formal and material) effectiveness of an assignment (the proprietary aspects), even as between the assignor and the assignee, would be subject to the law of the assignor's location.⁷³

2. *Competing Claimant.* Another such provision defines “competing claimant” to ensure that all possible conflicts of priority are covered by the Convention. It includes other assignees, even if both the assignment and the receivable are domestic and thus outside the scope of the Convention. Creditors with a retention of title claiming a right in the assigned receivables as proceeds of their goods are also included.⁷⁴

B. Mandatory Law and Public Policy Exceptions

A further cost-saving provision deals with conflicts between a priority rule of the applicable law and public policy or a mandatory law rule of the forum.⁷⁵ The Convention provides first that the applicable priority rule may be set aside only if it is *manifestly* contrary to the public policy of the forum state (e.g., provides that domestic assignees always have priority over foreign assignees). The second step is that a mandatory law rule of the forum may result in setting aside a priority rule of the applicable law but may not apply in the place of the displaced rule. Instead, the balance of the applicable law priority rules will apply. The reason for this novel approach is that replacing the applicable priority rules with the priority rules of the forum would create uncertainty, which would negatively affect the cost of credit. There is one exception to this rule; super-priority rules of the forum, such as, for example, rules in favor of the state for taxes, or employees for wages, may apply instead of the applicable priority rules.⁷⁶

73. For a different analysis, see *id.* at 289–90.

74. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 5(m).

75. *Id.* art. 23(2).

76. *Id.* art. 23(3).

C. Law Applicable to Priority in Proceeds

The Convention does not contain a general rule on the law applicable to priority in proceeds. The reason lies in the divergencies existing between legal systems with respect to the nature and the treatment of rights in proceeds.⁷⁷

However, the Convention contains a limited proceeds rule, which is intended to facilitate practices such as securitization and undisclosed invoice discounting.⁷⁸ In such practices, payments are channeled to a special account held by the assignor, separately from its other assets, on behalf of the assignee.

In order to give effect to such practices, the Convention provides that, if the assignee has priority over other claimants with respect to the receivables, it has the same priority with respect to their proceeds, provided that they are held by the assignor on behalf of the assignee and are reasonably identifiable (e.g., they are held in a separate account).

Parties wishing to avoid problems existing in various national laws with respect to rights in proceeds would be well advised to structure their payments in a way for them to fall under this “lock-box provision.”

D. Optional Substantive Law Priority Rules

Even if it is not fully satisfactory from a legislative point of view, the Convention’s approach to priority is based on the assumption that parties will structure their transactions in a way that would result in referring priority questions to the appropriate law.

However, the Convention goes a step further and offers states a choice between three substantive law priority systems.⁷⁹ One is based on notice filing, another is based on notification of the debtor, and a third is based on the time of conclusion of the contract of assignment.⁸⁰ States that wish to adjust their legislation may, through the adoption of a declaration, opt into one of these priority regimes. The

77. In some legal systems the rights in receivables are extended to proceeds, since they are considered, in effect, the same asset in another form. In other legal systems, however, no such right in proceeds is recognized, since proceeds are considered as distinct assets from the receivables from which they arise.

78. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 23(2).

79. *Id.* Annex. For the choices available to states and their effects, see *id.* art. 42.

80. *Id.* Annex I, III or IV.

assumption is that, in an environment of free competition between legal regimes, the one with the most economic benefits will prevail.⁸¹

VII. INDEPENDENT CONFLICT-OF-LAWS RULES

A. Scope of Application

The Convention contains a set of conflict-of-laws rules (see Chapter V of the Convention) that may apply if the forum is in a state party to the Convention, whether the assignor or the debtor is located in, or the law governing the original contract is the law of, a state party to the Convention.⁸²

These rules may apply to transactions within the scope of the provisions of the Convention other than Chapter V (i.e., where the assignor, or the debtor, where necessary, is located in a state party to the Convention, or the law governing the original contract is the law of a state party to the Convention), to fill the gaps in the Convention.⁸³

The independent conflict-of-laws rules may also apply to transactions outside the scope of the provisions of the Convention other than Chapter V (i.e., where the assignor, or the debtor, where necessary, is *not* located in a state party to the Convention, or the law governing the receivable is *not* the law of a state party). Such transactions need to be international, as defined in the Convention, and not be excluded from the scope of the Convention.

However, the independent conflict-of-laws rules of the Convention are subject to a reservation.⁸⁴ This reservation was allowed to ensure that states that wished to adopt the Convention would not be prevented from doing so merely because the independent conflict rules were inconsistent with their own conflict rules.

B. Form of Assignment

In the case of a contract of assignment concluded between persons located in the same state, formal validity of the contract of as-

81. For the importance of a registration system for cross-border receivables financing, see Steven L. Schwarcz, *Towards a Centralized Perfection System for Cross-border Receivables Financing*, 20 U. PA. J. INT'L ECON. L. 455 (1999).

82. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 26.

83. *Id.* art. 7(2).

84. *Id.* art. 39.

signment is subject to the law of the state which governs the contract or of the state in which it is concluded.⁸⁵

In the case of a contract of assignment concluded between persons located in different states, the contract is formally valid if it satisfies the formal requirements of either the law which governs it or the law of one of those states.⁸⁶

C. Law Applicable to the Mutual Rights and Obligations of the Assignor and the Assignee

The mutual rights and obligations of the assignor and the assignee are subject to the law of their choice (e.g., the interpretation of the terms and conditions, the assignee's obligation to extend credit, the existence and effect of representations).

The parties' freedom of choice is subject to the public policy of the forum and the mandatory rules of the forum or a closely connected third country.⁸⁷

In the absence of a choice of law, the law of the state with which the contract of assignment is most closely connected governs.⁸⁸ The close-connection test was adopted in this case since it is unlikely to have much impact in view of the fact that in the vast majority of cases parties choose the applicable law.

D. Law Applicable to the Rights and Obligations of the Assignee and the Debtor

The relationship between the assignee and the debtor, the conditions under which the assignment can be invoked as against the debtor, and contractual limitations on the assignment, are subject to the law governing the original contract.⁸⁹ The fact that most of these issues are covered by the substantive law rules of the Convention limits the impact of this provision. However, certain issues were deliberately not covered in the substantive law rules of the Convention,

85. Form as a requirement of priority is subject to the law of the assignor's location. *Id.* arts. 5(g), 22, 30.

86. *Id.* art. 27. This approach is in line with the approach taken in the Rome Convention.

87. *Id.* arts. 31, 32; *see also* Walsh, *supra* note 19, at 187.

88. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 28.

89. *Id.* art. 29. This approach is in line with Article 12(2) of the Rome Convention. It ensures that the debtor's rights and obligations can be changed only to the extent permitted by the law governing the original contract. Article 29, however, refers to the law governing the original contract, since, unlike the Rome Convention, the Convention deals only with contractual receivables.

such as, for example, the question as to when a right of set-off is available to the debtor under Article 18. In particular, this last question is governed by Article 29, at least with respect to transaction set-off (i.e., set-off arising from the original contract or another contract that was part of the same transaction).

Another question falling within the scope of Article 29 is the effect of anti-assignment clauses in the case of assignments of receivables to which Article 9 does not apply (either because they relate to assignments of non-trade receivables or because the debtor is not located in a state party to the Convention).⁹⁰

E. Law Applicable to Priority

Priority is referred to the law of the assignor's location.⁹¹ The value of this rule is that it may apply to transactions to which Article 22, which it repeats, does not apply because of the absence of a territorial connection between an assignment and a state party to the Convention.

F. Impact of the Independent Conflict-of-Laws Rules

The value of the independent conflict-of-laws rules lies in their gap-filling function with respect to the law applicable to matters covered, but not expressly settled, by the provisions of the Convention outside Chapter V. In addition, these provisions are useful to the extent they function as a separate mini-convention with respect to matters not covered by the provisions of the Convention outside Chapter V.

VIII. CONCLUSION

The Convention eliminates or reduces a number of obstacles to cross-border transactions relating mainly to certain statutory limitations and to contractual limitations. The validation of assignments of future receivables, bulk assignments, and assignments made despite

90. Unlike Article 12(2) of the Rome Convention, Article 29 does not refer to the term "assignability." While it covers contractual limitations on assignments, it does not cover statutory limitations, since most statutory limitations are designed to protect the assignor rather than the debtor. An assignment violating a statutory limitation would be ineffective as between the assignor and the assignee and therefore the issue of its effects as against the debtor, which is the subject of Article 29, would not arise. See Walsh, *supra* note 19, at 201–02.

91. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 1, art. 30.

anti-assignment clauses in the relevant original contracts is particularly significant in this regard.

In addition, the Convention promotes certainty with respect to a number of substantive law issues, such as those relating to the debtor's rights and obligations. Of particular importance is the structuring of the debtor's discharge around an objective criterion (i.e., written notification) and the separation of the debtor's discharge from issues of priority, as well as the preservation of the debtor's rights and defenses.

Moreover, the Convention breaks new ground in centralizing all priority issues to the law of the assignor's location. One of the most important achievements of the Convention may well prove to be the referral of priority in proceeds, covered by a so-called "lock-box arrangement," to the law of the assignor's location. This rule may well facilitate significantly receivables financing in countries in which property rights in proceeds are not recognized.

Furthermore, the Convention's independent conflict-of-laws rules provide useful guidance in filling gaps in the Convention and add value to the Convention to the extent they may unify generally applicable conflict-of-laws rules.

Finally, the optional substantive law priority rules contained in the Annex to the Convention usefully supplement the conflict-of-laws priority rules, referring to the law of the assignor's location, in the case of states desiring to modernize or harmonize their priority regimes.

Each of these steps will impact significantly upon cross-border receivables financing. In fact, if states widely adopt the Convention, it could be "the first step towards the globalization of asset-based lending."⁹²

92. Michael Carsella, *Uncitral Update*, 5 SECURED LENDER 6 (1999). The potential of the Convention is generally recognized by commentators. See Dorothee Janzen, *Der UNCITRAL-Konventionsentwurf zum Recht der Internationalen Finanzierungsabtretung*, Symposium in Hamburg am 18. und 19. September 1998 [The UNCITRAL Draft Convention on the Law of International Assignment of Financing, Symposium in Hamburg 18–19 Sept. 1998], 63 RABELS ZEITSCHRIFT 368 (1999); I. Lojendio Osborne, *Proyecto de convención internacional sobre cesión de créditos*, *Estudios de derecho mercantil: homenaje al Profesor Justino F. Duque Domínguez* [International Convention Project on Credit Cession, Studies of Commercial Law: In Honor of Professor Justino F. Duque Domínguez], 2 VALLADOLID 1251 (1998); Jean-Pierre Mattout, *Cessions internationales de créances, Les besoins de la pratique* [International assignments of claims, The needs of practice], 75 REVUE DE DROIT BANCAIRE ET DE LA BOURSE 165 (1999); Schwarcz, *supra* note 81; Jean Stoufflet, *Cessions internationales de créances, Les contraintes juridiques actuelles* [International assignments of claims, The current legal constraints], 75 REVUE DE DROIT BANCAIRE ET DE LA BOURSE 169 (1999).